IN THE

# Supreme Court of the United States

October Term, 1979
No. 79-205

STANLEY R. RADER,

*Petitioner,*

*vs.*

THE STATE OF CALIFORNIA,

*Respondent.*

## Petitioner's Reply Brief in Support of Petition for Writ of Certiorari.

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### INTRODUCTION.

The State of California's characterization of its action against the Worldwide Church of God and its impact on constitutional freedom of religion create a numbing sense of disbelief. The State describes the action simply as one for an accounting, as though the notion that a Church must account to the State for its income and expenditures were not the least startling on its face. Nowhere does the State's Brief mention that the action seeks to remove Church officers; and bar them in perpetuity from Church office or employment; that it seeks to restructure the form of Church governance; that it seeks appointment of a receiver to assume possession, management and control of all of the assets, books and records of the Church, Ambassador College and Ambassador International Foundation until further order of court. Nowhere does the

State explain that its charges of wrongdoing and its misrepresentations of the record are irrelevant to its supposed power to force disclosure of Church documents, to determine what are and are not proper religious expenditures, to dictate the form of Church governance, to pick and choose who shall and shall not be a Church official.

That the State's transformation of the Church from a religious body to a "charitable trust" is presented in softened form to this Court does not render that transformation any less unprecedented and unconstitutional. The State does not disavow, but simply refrains from repeating, its position that *the Church is no better than a ward of the State!*

Instead, the State bruits so-called evidence of "self-dealing" by Petitioner in a manner which is procedurally and factually inaccurate. To briefly set the record straight—(1) the hearing on January 10-12 was limited to matters alleged to support the January 2 *ex parte* appointment of a receiver. The State produced no credible evidence to support its sensational charges of massive misappropriation, document shredding and the rest, and the trial court so found; (2) the matter of Petitioner's compensation as a Church employee and certain business dealings of the Church over a span of more than a decade were, as acknowledged by the court, collateral to the proceeding; cursory examination of these topics was admitted solely as "background"; (3) counsel for Petitioner repeatedly offered to present the true complete facts regarding Petitioner's relations with the Church (from 1957 to 1969 he performed legal and accounting services; in 1969 at the request of the Church's Pastor General he organized a company to purchase media time for the Church;



in 1975 he became a Church member and officer and ended all outside employment and associations) to substitute for the State's innuendo. The court refused to expand the scope of the proceedings to accept such evidence on behalf of Petitioner (R.T. Jan. 10-12, pp. 147-153, 162-163, 199-201).

As little deference as the State pays the truth, it pays even less to the First Amendment which it buries in a flurry of hollow shibboleths—"charitable trust" and "neutral principles of law." Yet it is clear beyond question that both the State's end-goals in the action and the very litigation process (including depositions, interrogatories and compelled production of documents) infringe the Free Exercise and Establishment Clauses of the First Amendment and unconstitutionally entangle the State in Church affairs.

It is no coincidence that, with the stay of the receivership imposed on the Church, the State's efforts to interrogate Petitioner and others accelerated. If the receivership were not evidence enough, these discovery efforts clearly show that the State is intent on achieving untrammeled access to Church books, records and information merely by initiating suit, however groundless without any showing or proof of wrongdoing.

Merely by filing suit and vigorously pursuing discovery the State accomplishes procedurally what it could never do substantively—a regular reporting, accounting and justification by the Church to its self-appointed bureaucratic overseers. Thus, the State has turned the First Amendment on its head. Instead of requiring the State to bear the heavy burden of attempting to justify unprecedented intrusion into areas protected by the First

Amendment (see, *e.g., Buckley v. Valeo,* 424 U.S. 1, 64-66 (1974), the State has shifted the burden to Petitioner and the Church to prove their innocence of the State's groundless charges (see *Speiser v. Randall,* 357 U.S. 513, 524 (1958)). Indeed, while the State would have this Court believe the Church is using religion to mask fiscal fraud, the sorry truth is that the State is using spectacular and groundless charges of fiscal fraud to make an unprecedented intrusion into the very core of religious autonomy and privacy.

Petitioner respectfully submits this Reply Brief for the purposes of showing:

1. The State's action against the Worldwide Church of God and the effort to depose Petitioner constitute a continuing violation of rights of religious freedom guaranteed by the First Amendment;

2. Measured by the appropriate compelling state-interest standard, the action and its attendant discovery procedures are inescapably unconstitutional; and,

3. Petitioner's First and Fourteenth Amendment arguments are unanswered by the State.

**SUPPLEMENTAL STATEMENT OF FACTS.**

Subsequent to the filing of Petition for Writ of Certiorari, the State of California's motion to hold Petitioner in contempt for failure to appear to resume his deposition was heard on August 7, 1979. The trial court did not hold Petitioner in contempt, but ordered that he appear for deposition on August 27.

On August 7, Petitioner was in the People's Republic of China making advance preparations for the arrival of Herbert W. Armstrong, Pastor General of the Worldwide Church of God, to spread the gospel of Jesus



Christ. Petitioner was unable to return to this country as expected by August 27. Upon learning of this fact, counsel for Petitioner sought a stipulated continuance of his deposition from the Attorney General's Office, which was denied. The trial court declined to grant an *ex parte* application for continuance, and counsel thereupon noticed motion for continuance. This motion was heard on September 21, 1979, and Petitioner was ordered to appear for deposition on October 22.

## LEGAL ARGUMENT.

### I

### THE LITIGATION PROCESS, INCLUDING THE DEPOSITION OF PETITIONER, ITSELF RESULTS IN UNCONSTITUTIONAL INFRINGEMENT OF RELIGIOUS LIBERTY.

It is frankly incredible that the State of California would attempt to maintain the pretense that its action against the Worldwide Church of God is unaffected by the First Amendment. *McCormick v. Hirsch*, 460 F.Supp. 1337 (M.D. Pa. 1978), affords a convenient checklist of the various respects in which the action infringes religious liberty:

> "The [Supreme] Court in applying this [entanglement] test has shown a particular concern and has *sought to avoid* active involvement of the sovereign in religious activities, the risk inherent in programs that bring about an administrative relationship between public bodies and [churches], governmental evaluation and standards with respect to religious practices, any kind of day-to-day relationship between church and state, extensive investigation into church operations or finances, any sustained or detailed administrative standard, . . . and the entanglement of government in difficult classifications of what is or is not religious. *The listing of these suspect areas of entanglement illustrates the kinds of involvement with a church entity that will simply not be tolerated.*" (Fn. omitted; final emphasis added.)

Patently the State's goals in this action fall within the realm of proscribed State activities. Equally important, however, is that the very litigation process itself,



depositions of Petitioner, Herbert W. Armstrong (Pastor General of the Church) and others, compelled production of documents and the like entails the same entanglement of Church and State. (See *Buckley v. Valeo, supra*, 424 U.S. 1, 64-66; *Shelton v. Tucker*, 364 U.S. 479, 488-490 (1960); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544-545 (1963); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).)

The recent case of *Surinach v. Pesquera de Busquets*, .... F.2d .... (1st Cir. No. 78-1527), is squarely on point on its facts. There, the Secretary of the Department of Consumer Affairs of the Commonwealth of Puerto Rico launched an investigation of the costs of private schools operating in Puerto Rico, an investigation which encompassed parochial schools under the aegis of the Roman Catholic Church. The Secretary ordered various church and school officials to provide him with specified documents and books and to furnish such information as the school's annual budgets for the three previous years; the source of their finances (registrations, donations, governmental and others); costs of transportation; student cost per academic grade for registration, admission dues, activities, medical insurance, nourishment services, materials and school uniforms; the salaries paid to teachers, administrative, maintenance and other personnel; book costs and invoices per grade and their resale prices as well as the names and addresses of book suppliers; and scholarships and the criteria upon which they were awarded; the plaintiffs refused compliance with the order and brought suit alleging that the Secretary's actions were in violation of the Religion Clauses of the First Amendment and constituted an impermissible entanglement of the affairs of church and state.

The District Court dismissed the action, adopting the same argument made by the State of California herein that "The general investigation to which [the Catholic schools] are being subjected does not penalize, hinder or otherwise curtail any religious practice of plaintiffs"[1] and that the amount of entanglement engendered at least in the preliminary information gathering stages of the investigation fell short of a constitutional transgression. The Court of Appeals, through Chief Judge Coffin, reversed, making at least ten points pertinent to our case:

a. The District Court's "bifurcation of the gathering of the information and the purpose for which it is sought strikes us as both artificial and constitutionally unsound. . . . The gathering of information is not viewed as an end in itself." (p. 4.)[2]

b. "[I]n the sensitive area of First Amendment religious freedoms, the burden is upon the State to show that implementation of a regulatory scheme will *not* ultimately infringe upon and entangle it in the affairs of the religion to an extent which the constitution will not countenance. In cases of this nature, a court will often be called upon to act in a predictive posture; it may not step aside and await a course of events which promises to raise serious constitutional problems." (p. 6.)

c. "While we agree that there has been no showing of any purpose to inhibit religion, the effect

[1]Compare Opposition, page 12: "Thus the purpose of this lawsuit . . . does not impact in any way upon religious doctrine or practice. Therefore, cases involving government regulations or actions which adversely affect religious doctrine or practice are not in point."

[2]Page references are to the Slip Opinion of *Surinach*.



of the Commonwealth's actions, even though aimed at private schools in general, constitutes a palpable threat of state interference with the internal policies and beliefs of these church-related schools. . . . '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.' " (pp. 7-8)

d. "We think it clear that the eventual use to which the school's cost information could be put could interfere seriously with these religious duties and objectives. The Department, sifting through the details of the school's budgets and holding its hearings, may conclude that costs are rising too fast and must be contained to a specified level. While such a determination might be consistent with the Department's mandate, it surely could clash with what is a religious belief and practice of those who administer these schools, namely that the highest quality education possible must be provided to their students. We do not suggest that quality of education and the expenditure of money invariably are linked, but it would be unrealistic to assume that the curricula and facilities of these schools would not be curtailed and hence religious objectives affected if they were forced to contain their costs." (p. 9)

e. "[I]t seems likely that as the regulatory process unfolds, some determinations of which costs are 'necessary' and 'reasonable' in the running of a private school would have to be made. . . . [T]he value judgments and sense of priorities

of the regulator and regulatee are likely to be grounded in wholly different concerns. And whether the schools were to be ordered specifically to increase teacher-student ratio as a means of cost containment, or whether that factor merely would figure in the Department's conclusion and order that costs in general must be contained, a wholly secular objective would be furthered at the expense of one which is religious. We find it scant comfort that no such judgments have yet been brought to bear by the Department, or that the Department might ultimately conclude that the costs of these schools need not be contained by government controls. The appellants' ability to make decisions concerning the recruitment, allocation and expenditure of their funds is intimately bound up in their mission of religious education and thus is protected by the free exercise clause of the First Amendment." (pp. 9-10)

f. "The Department's attempts to take its first steps down its regulatory road by gathering information accordingly are suspect, both in light of the purpose for which the information is sought and in itself, for as has long been recognized, 'compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights.' [Citation.] We see that potential in the chilling of the decision-making process, occasioned by the threat that those decisions will become the subject of public hearings and that eventually, if found wanting, will be supplanted by governmental control. [Citation.] And even if that governmental control



should not come to pass, disclosure of the schools' finances—from amounts of donations to details of expenditures—could provide private groups or the press with the tools for accomplishing much the same ends." (p. 10)

g. "The subpoenas which generated this controversy sought extremely detailed information about the expenditure of funds of these Catholic schools. If the schools are forced to comply, that information will be subjected to governmental perusal, to public examination, and ultimately may form the basis for significant governmental involvement in their fiscal management. Even if we were able to countenance the degree of entanglement occasioned by the government's involvement in these details of fiscal administration, we could not feel confident that an end to that involvement was in sight. To the contrary, with ceilings in place, the Commonwealth would have the ongoing powers necessary to insure compliance with its orders and regulations, from compelling the keeping of records and the providing of testimony to the continuing inspection of papers and physical facilities. [Citations.] This governmental program thus has the 'self-perpetuating and self-expanding propensities' which have alerted courts to an increased danger of an unconstitutional degree of entanglement." (p. 11)

h. "Unlike the programs in *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)], this regulatory scheme does not call upon the state to identify certain expenses as religious or secular. It does, however, permit it to intrude upon decisions of

religious authorities as to how much money should be expended and how funds should best be allotted to serve the religious goals of the schools. Either form of involvement strikes us as 'a relationship pregnant with dangers of excessive government direction of church schools and hence of churches.' " (p. 12)

i. "[T]he Secretary's demands for the financial data of these schools both burden the free exercise of religion and pose a threat of entanglement between the affairs of church and state. . . ." (p. 12)

j. Since the Commonwealth failed to demonstrate a compelling state interest or that it had pursued its objectives in the manner least intrusive upon religious freedom the judgment was reversed and the District Court was directed to enter an order declaring unconstitutional the challenged orders and permanently enjoining the Department from enforcing such orders. (pp. 12-15)[3]

[3]A case similar in some respects is *Fernandes v. Limmer*, 465 F.Supp. 493 (N.D. Tex. 1979). There, a resolution/ordinance restricting solicitation at a local airport included a provision making the cost of solicitation presumptively unreasonable when it exceeded 25% of the amount collected. To enforce this provision the resolution/ordinance permitted examination of all accounting and bookkeeping records, tax records, etc., of a charity for audit. As applied to a religious organization, the District Court held:

> "Recent Supreme Court cases . . . clearly indicate that this type of financial inquiry into the use of church funds is not constitutionally permissible . . . [¶] No church or political party should be compelled to bare itself of its membership lists and explain the source and use of each dollar without showing compelling needs achievable by no adequate alternative. Unless such a need is shown for disclosure, not established in this record, the potential for chilling effect on donors, members, and those who associate with the Society and deal with it financially is great, as is the impact of the Churches' privacy. The rights of association and financial privacy are too great to be easily brushed aside [citations]. [¶]. . . . These provisions for financial disclosure, etc., are thus unconstitutional on their face." (Footnote omitted; at pp. 504-505.)



These cases elaborate on the consistent holdings of this Court to the effect that the First Amendment "has erected a wall between church and state which must be kept high and impregnable." (*McCollum v. Board of Education*, 333 U.S. 203, 212 (1947); *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).) It cannot be the case that this wall topples simply because the State files a lawsuit or fabricates some other basis for intervention in religious affairs. If the wall ever meant anything, now is the time it must be buttressed.

## II

## NO COMPELLING STATE INTEREST SUPPORTS THE STATE'S ACTION AGAINST THE WORLDWIDE CHURCH OF GOD AND ITS EFFORT TO DEPOSE PETITIONER. NOR IS THIS SWEEPING INVASION OF FIRST AMENDMENT FREEDOMS THE LEAST INTRUSIVE MEANS OF PURSUING ANY LEGITIMATE INTEREST THE STATE MAY HAVE.

### A. No Compelling State Interest Justifies These Proceedings.

State action resulting in establishment of religion or impairing its free exercise must be supported by a compelling state interest which cannot be furthered by action less intrusive on religious liberty. (*Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).)

"[O]nly those interests of the highest order" have been found sufficiently compelling to legitimize impair-

ment of the fundamental rights secured by the First Amendment. (See *Wisconsin v. Yoder, supra,* 406 U.S. 205, 215.) "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." (*Sherbert v. Verner, supra,* 374 U.S. 398, 403.) Such compelling interests are few in number (see *e.g., Gillette v. United States,* 410 U.S. 437, 462 (1971); *Prince v. Massachusetts,* 321 U.S. 158, 168-169 (1944)); not surprisingly, their number does not include "to halt and correct fraudulent diversion" of church funds.

One obvious reason why "to halt and correct" fraud is not a compelling state interest is that there is no necessary role for the State in a true fraud proceeding in California. Ordinarily persons who consider themselves victimized are fully capable of seeking legal redress without the intervention of the State. Even in the case of non-religious charities, if for some reason their officers or directors could not sue, corrective action could be brought by any responsible individuals within the organization. (*San Diego etc. Boy Scouts of America v. City of Escondido,* 14 Cal.App.3d 189, 195, 92 Cal.Rptr. 69 (1971).)[3a] In any event, if California's law on standing to sue compelled State intervention in religious affairs, the law of standing should be changed to accommodate the First Amendment, not vice versa. (See *Jones v. Wolf,* ..... U.S. ....., 61 L.Ed.2d 775, 787-788 (1979).)

[3a]The State's misplaced zeal has resulted in more than one misstatement of California law. Compare, for example, the description of state law at Opposition, page 12, footnote 7, with the provisions of the California Civil Code section 2228-2235 cited as support.



**B. The State's Supposed Interest in Dealing With Alleged Fraud Can Be Served Without Such Violent Impact on Religious Freedoms.**

Even if it is assumed, *arguendo,* that the State has some legitimate interest underlying the lawsuit, it must demonstrate that this interest cannot be served without such drastic invasion of First Amendment rights. The State has made no attempt to and cannot satisfy this burden.

Fraud prevention or correction is one of the most frequently asserted bases for state action infringing on First Amendment rights. The consistent answer of the courts is that the state should pursue this interest by prosecution under its criminal laws.

As concisely put in *Intern. Soc. for Krishna Consciousness v. Bowen,* 600 F.2d 667, 669 (7th Cir. 1979):

> "The interest in combating fraud is served by the use of penal laws to punish this conduct."

Accord:

*Cantwell v. Connecticut,* 310 U.S. 296, 306 (1940) ["Nothing we have said is intended even remotely to imply that under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct."];

*Schneider v. Irvington,* 308 U.S. 147, 164 (1939) ["Frauds may be denounced as offenses and punished by law."].

See, also:

*Sherbert v. Verner, supra,* 374 U.S. 398, 407;

*Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 109-110 (1952);

*Davis v. Beason,* 133 U.S. 333, 342-343 (1890);

*Fernandes v. Limmer, supra,* 465 F.Supp. 493, 503.

The State has consistently accused Petitioner and others of criminal conduct. The State has said that *before* this action was even begun it had evidence "to a substantial certainty" that Petitioner and others were guilty of "misappropriation of millions of dollars in Church assets".[4] Plainly, the State, to the extent it has any interest in these matters, should pursue them in a manner which is not calculated to destroy the rights of religious freedom of the Church and members, including Petitioner.

The State's periodic suggestion that criminal proceedings would not result in recoupment of alleged misappropriations is manifestly disingenuous. The Attorney General stated as long ago as February 21 that its action included "no prayer for recovery of defalcations" and contemplated additional lawsuits in the event misconduct were proven. (R.T. Feb. 21, 1979, p. 145.) Obviously criminal proceedings would afford the same groundwork for subsequent lawsuits if wrongdoing were proven.[5] In fact, if criminal conduct could be proven, there would be no need for such subsequent civil actions since California law permits that restitution may be required as a condition of probation. (California Penal Code §1203.01.)

[4]Petitioner is confident the State has no such evidence. What the State is really saying is that it disapproves of the manner in which the Church spends money in accomplishing its religious mission of spreading the gospel of Jesus Christ. But if the State may inquire into this area with this Church, it may make similar inquiry with all other churches, including inquiry into the expenditures of the Catholic Church in connection with the recent travels of Pope John Paul II.

[5]Indeed, the Attorney General appears to be following an exactly contrary path, using nominally civil proceedings for the purpose of discovering whether there was criminal conduct.



Thus it is plain that if the State's interest were as it is described to this Court it could be served by means less invasive of freedom of religion. This is further illustration that the State's underlying premise is not that it may demand that the Church account, have unlimited access to Church records and information, remove and replace its leaders, and determine how the Church should perform its religious functions only when it alleges wrongdoing, but rather that the State may do so at any time it pleases by virtue of a supposed general supervisory power over churches. The premise is profoundly wrong.

The action as a whole and the very litigation process itself constitute a sweeping invasion of First Amendment rights. Accordingly, the order that Petitioner appear for deposition in these unconstitutional proceedings should be vacated.

## III

## THE ORDER THAT PETITIONER APPEAR FOR DEPOSITION VIOLATES HIS RIGHTS TO REMAIN SILENT AND TO DUE PROCESS OF LAW.

Petitioner's Fifth and Fourteenth Amendment arguments are unanswered by the State's Opposition Brief.

a. The Attorney General does not deny that his office is working in close cooperation with other criminal law enforcement agencies, or that it is funneling information obtained in this supposedly civil proceeding to such agencies.

b. The Attorney General does not explain why, if in 1978 his office had evidence "to a substantial certainty" that Petitioner was "guilty of misuse and misappropriation of millions of dollars" no criminal proceedings were brought.

c. The Attorney General does not disclaim an effort to use this lawsuit as a "shortcut to goals otherwise barred or more difficult to reach" (*United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958)).

d. The Attorney General cannot seriously assert that Petitioner's status as a lawyer or the fact he has counsel means Petitioner has no right to remain silent. It was, after all, the Attorney General who advised Petitioner of his right to remain silent and his right not to testify at all in this proceeding.

e. The Attorney General contradicts his earlier position that he would not attempt to question Petitioner if Petitioner would make a blanket refusal to testify on grounds of self-incrimination by now suggesting that Petitioner's only right is to claim a right against self-incrimination on a question-by-question basis. This clearly shows the Attorney General is interested less in the validity of such a claim than in forcing Petitioner to make it.

For the numerous reasons previously cited, Petitioner submits the order compelling him to appear for deposition following invocation of his right to remain silent is void under the Fifth and Fourteenth Amendments.



**CONCLUSION.**

While the receivership of the Church has been temporarily stayed, the destruction of First Amendment rights proceeds. The State demands and the trial court grants virtually the same unlimited access to the most detailed and confidential Church information. The order for Petitioner to testify is only one of a continuous stream of such orders. If these efforts succeed *now* it will hardly matter that, at some *future* time, this Court will vindicate the First Amendment rights of Petitioner and the other nearly 100,000 members of the Worldwide Church of God.

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